

UTAH SCHOOL LAW UPDATE

Utah State Office of Education

April 2008

Internet Speech

The development of the Internet has left the boundary lines between the schoolhouse and the private conduct of students unclear.

Generally, schoolhouse speech has been awarded special protections if it exhibited one of three special characteristics. The first of these characteristics is that schools have an interest in protecting the physical safety of their students well above the interest of the government in protecting the general public. The second is the immaturity of the audience. Schools can protect captive adolescents from sexual speech. The third is the need to maintain impartiality in the cases where a limited forum for student speech exists.

Given these characteristics, it is clear schools may ban sites where the content is inconsistent with the school's educational objectives or that contain other questionable forms of content.

Questions arise, however, when schools make Internet access generally available for student use, which is not clearly a schoolsponsored activity.

Internet content developed by students further complicates matters for school administrators because content can be developed outside the schoolhouse, yet it can have serious repercussions within the school.

Schools' administrators are able to enforce disciplinary action when oncampus distribution of harassing, offensive, or threatening materials against students or administrators has occurred via the Internet, despite the fact that the materials were authored off-campus.

In these cases the courts found a link be-

tween the offcampus speech that would cause a mate-



rial disruption in school functions.

More recent cases, however, do not necessarily contain this critical link.

While there is no clearly defined standard for school administrators to consider when they find disparaging or critical Internet content posted by students, some general guidelines have been articulated.

School officials contemplating action over student speech on the Internet should first consider if the speech is in fact protected. Threatening or harassing speech or

speech of **imminent** violence is not protected.

School administrators should next consider if there is an on-campus component to the dissemination of the information or if school facilities have been used to publicize or disseminate the information.

Finally, when Internet materials have been clearly developed at home and not using school facilities to disseminate or publish information, a

substantial or material disruption to school function justifies intervention.

Alternatively, courts

have generally upheld the adoption by many schools of use policies to control use of the school's computer system. These require each student user to comply with uses that are consistent with school values and consequently may preclude certain uses of the system, ranging from destruction of computer files to the sending of insulting email. In this way, administrators are given an additional means of monitoring student use of the Internet—at least while on school premises.

Guest column by Michelle Kincaid, BYU College of Law Extern to Carol Lear.

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UPPAC CASES

- The Utah State Board of Education reinstated Lindsay Smith's educator license. Smith's license was suspended following her conviction for theft.
- The State Board accepted a Stipulated Agreement suspending Ronald Johnson Silver's educator license for three years. The suspension results from Silver's guilty plea (held in abeyance) to one felony count of dealing in material harmful to minors.

Eye On Litigation

Much attention has been focused on a California court ruling on the rights of parents to home school their children.

The case, <u>In re Rachel L.</u>, relies on California law, but also notes the U.S. Supreme Court's unwillingness to declare home schooling to be a constitutional right.

The lawsuit arose in a child neglect/abuse context. One of the older of the parents' eight children alleged physical and emotional abuse by the father.

In the course of the Division of Child and Family Services investigation, the investigator discovered that all eight children were home schooled by the mother.

California law does NOT provide a home schooling exemption in its compulsory education law. It does provide that a student meets the law if he is attending a full-day private school or is receiving instruction from a credentialed tutor.

The mother argued that her home

schooling met the statutory requirements because her children were "enrolled" in a private school which conducted home-based reviews and the children took some tests at the private school.

The court determined that this did not meet the requirements of full-day attendance at a private school or of the credentialed tutor option.

While much of the case is dependent on California's lack of a home school exemption, the analysis of U.S. Supreme Court law on the right of parents to home school does apply on a broader basis.

The California Court of Appeals noted that, since the time of <u>Pierce v. Society of Sisters</u>, ample case law has affirmed the States' power to require education AND to require that private schools meet certain standards, such as providing the required curriculum for a specific number of hours in order to satisfy compulsory education.

The parents relied on <u>Wisconsin v.</u> <u>Yoder</u>, a U.S. Supreme Court case

which upheld the rights of Amish families to pull their children from school after the 8th grade based on their religious convictions.

The court distinguished the Amish families in <u>Yoder</u> from the family in California, noting that the Amish were able to show that public or private school attendance would not only expose the students to values contrary to those of the Amish, but it would also take the students away from the community at the time they were expected to integrate into the community.

The court found the decimation of the Amish culture through schooling a far more compelling justification than the California parents' unsupported assertions that home schooling comports with their religious beliefs.

The court also noted that the <u>Yoder</u> Court "rejected the notion that parents have a universal right to refuse to obey a state's compulsory education law."

UPPAC Case of the Month

Educators with criminal convictions in their past may have those convictions "expunged." However, an expunged record is somewhat like a computer file—it's never really gone.

More importantly for educators, the Utah Professional Practices Advisory Commission has access to expunged records.

For certain crimes and punishments, an individual can petition the court to have the record expunged after a set period of years. Expungement is not automatic; the person with the record must take affirmative action and ask the court to delete or seal the record. This is complicated by courts having different processes, timelines, forms, and standards for expungement.

Individuals who have completed the terms of any plea in abeyance, diversion agreement, or probation may have their records expunged. If the expungement is granted, it is as if the conviction never occurred and the individual can legally answer "no" on any application that asks if the person has been convicted of a crime.

However, by law, certain agencies are allowed access to the sealed records without a court order. These include the Board of Pardons and Parole, Peace Officer Standards and Training (POST), the Division of Occupational and Professional Licensing (DOPL), and the State Office of Education. In short, any group that has professional licensing authority, and the parole officer, have a legal right to ensure that any past indiscretions on the part of the individual are not of such a nature or degree, or so numerous or recent, that the person's ability to serve in a profession (or be paroled) is called into question.

Educators seeking licensing need to be aware, then, that the background check will include a reference to expunged records and the Commission will have to review the applicant's history to determine if licensing is appropriate.

In the case of an educator who is licensed and is facing allegations of educator misconduct, expunged records may be reviewed to determine if there is a pattern of similar conduct. For example, if an educator is referred to UPPAC for sexual misconduct with a student, the Commission will consider prior acts of sexual misconduct that may have led to criminal charges.

The expungement statutes recognize the need for a balance between the rights of an individual to move on from youthful folly or serious missteps in judgment, and the need to ensure the integrity of licensed professions.

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Recent Education Cases

Board of Directors v. Cullinan (Iowa 2008). The Iowa Supreme Court upheld the termination of a coach's contract based on a pattern of intimidating students.

The coach received notice in the spring of 1998 that his probationary status would be extended based on parent complaints about his use of profanity and threatening and intimidating treatment of players. He was admonished to create "a less threatening environment for players."

No parents complained about Cullinan during the 1998-1999 school year.

A player filed seven harassment claims against Cullinan during the 2000-01 school year. The complaints stemmed from Cullinan's name-calling and profanity.

In 2002, fifteen parents, including parents of students who had already graduated, filed 16 complaints against Cullinan's tactics and the environment he had created on the court.

In response, Cullinan offered several letters from fellow coaches familiar with his program.

After considering the totality of the behaviors and complaints, the district implemented a remediation plan. The plan included a requirement that any corrective action with students be done in the presence of an assistant coach or the student's counselor or parent.

Cullinan then engaged in a corrective discussion with a student without the proper witnesses.

The district decided to terminate Cullinan's coaching contract. Cullinan argued that the action was unsupported by the evidence because the district relied on the written complaints of the parents, instead of having the parents testify, and, he argued, the conversation with the student was not "corrective."

The court was not persuaded, finding that the district had ample evidence of a pattern of concerning behavior and could consider the written statements of the parents. The court reasoned that, if Cullinan wanted to examine the parents, he could have called them as witnesses.

The court also found that the altercation with the student was corrective based on the testimony of witnesses.

<u>Chisholm v. Tippens</u> (Ga. App. 2008). The Court of Appeals of Georgia upheld the dismissal of a parent's multiple claims against a school district and its employees.

The parent alleged several tort

and constitutional claims against the district, including mental anguish, neglect, harassment, cruelty, reprisal, discrimination, and defamation. The parent sought \$2 million in punitive damages against the district because it refused to conduct a requested evaluation of his daughter and denied him access to his daughter's records.

The court found that decisions about evaluation and placement of students are discretionary acts of the district and, therefore, the district is immune from liability regarding those decisions, unless it acted with actual malice in making the decisions. The parent's claims that the district's refusal to, among other things, place his daughter in the class he wanted her in and refusal to set up conferences with him were not evidence of "actual malice."

The court also ruled that, even if the parent could prove he was wrongfully denied access to his child's education records, the federal Family Educational Rights and Privacy Act does not provide for a private cause of action against the school. Thus, Chisholm has no right to sue the school based on the denial of records.

Your Questions

Q: What exemptions from state law and rule currently exist for charter schools?

A: Charter schools are exempt from (1) state laws regarding the use of school buildings as civic centers, (2) the use of activity disclosure statements, (3) requiring notice of intent to dispose of textbooks, (4) requiring annual presentations on adoptions, (5) laws related to fiscal procedures for districts and local boards, and (6) textbook alignment requirements.

What do you do when. . . ?

Charters are also exempt from State Board rules (7) regarding libraries, school administrative and supervisory services, and (8) required expenditures for instructional supplies. 53A-1a-511.

The schools are further exempt from (9) the Orderly School Termination Act, (10) Educator Evaluation law, and (11) the nepotism statute. The schools also need not abide by (12) licensing requirements for educators and can employ either a licensed individual or someone with demonstrated competency.

Charters may also request additional waivers from State Board rules as needed.

Q: Were there any changes in the Open and Public Meetings Act during the 2008 legislative session?

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250 East 500 South P.O. Box 144200 Salt Lake City, Utah 84114-4200

Phone: 801-538-7830 Fax: 801-538-7768 Email: jean.hill@schools.utah.gov





The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education, sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

Your Questions Cont.

(Continued from page 3)

A: No. A few bills were offered, but none passed both houses of the legislature.

Q: A financial aid service has asked for directory information for a specific group of students based on ethnicity. The federal FERPA law allows us to provide information for financial aid purposes, but the organization wants the information for marketing purposes. Can we send directory information for students identified by their ethnicity?

A: The district should NOT send directory information in a manner that reveals private information about students, and ethnicity is private information.

As another example, schools would not honor a request for

directory information on students who qualify for free and reduced

lunch. Regardless of the purpose for which a company seeks the info, this would identify the students in a manner that violates their privacy.

The same holds true for ethnicity.

The school can provide directory information for all of its seniors to the financial aid company, but can only provide more detailed information for students who are seeking financial aid from the organization.

Q: A teacher is running for the legislature. Can the teacher answer questions about her candidacy if parents or students ask?

A: A teacher can respond to a question, but should not go into great student's detail about his or her candidacy on situation.

school time. The candidate explain that he or she is running for office and would be glad to discuss the political race off of school time.

Q: A coach was recently in the news for "manhandling" a student. When is it appropriate to restrain a student?

A: A teacher/coach/school employee may use reasonable force to protect a student from himself or others or to protect school property. Whether the force used is reasonable depends on the circumstances.

Thus, a teacher may need to grab a student and physical move him away from a fist fight, but the teacher may not hit the student in frustration over the student's involvement in the situation.